No. 5828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

Appellant,

vs.

T. I. BUTLER CO. (a corporation), J. S. GUERIN and STEPHEN I. GUERIN, copartners, doing business under the name of J. S. Guerin & Co., and GOLDEN GATE ATLAS MATERIALS CO. (a corporation),

Appellees.

BRIEF FOR APPELLANT.

ERNEST J. TORREGANO,
CHARLES M. STARK,
Mills Building, San Francisco,
Attorneys for Appellant.

AUGUST B. ROTHSCHILD,
Mills Building, San Francisco,
Of Counsel.

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STATEMENT OF THE CASE.

On March 30, 1929, the appellees filed an involuntary petition in bankruptcy against the appellant. The Act of Bankruptcy alleged therein was a transfer by appellant while insolvent and within four months next preceding the date of the petition of a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors. The particulars of this transfer were alleged on information and belief and the fact that the money trans-

ferred was the property of the appellant is also alleged on information and belief as was the allegation that the transferee was an unsecured creditor of the appellant.

The verification of each of the three petitioning creditors was substantially in the following form:

> "United States of America,)
> State and Northern District of California,) *ss.*
> City and County of San Francisco.)
>
> T. Butler, being first duly sworn, deposes and says:
>
> That he is an officer, to wit, the President of T. I. Butler Co., a corporation, one of the petitioners mentioned in the foregoing petition, and that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, *except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.*" (Italics ours.)

The appellant duly filed a notice of motion to dismiss the petition because of these defects, and thereafter the learned District Judge ordered that the said motion be denied and that an exception be allowed to the ruling of the Court.

Thereafter an order of adjudication was signed by the said District Judge and entered in the records of the District Court, from which order the appellant has prosecuted this appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The first error relied upon was the order of the District Court adjudicating the appellant a bankrupt in spite of the fact that the appellant had timely

raised the objection that the allegations of the Act of Bankruptcy were based on information and belief, and that no reason was alleged in the petition as to why they could not have been made on positive knowledge.

The second error relied upon was the order of the District Court adjudicating the appellant a bankrupt in spite of the fact that he had timely raised the objection that the petition was not verified in accordance with the general orders and the form prescribed and promulgated by the United States Supreme Court pursuant to the provisions of the Bankruptcy Act.

ARGUMENT.

Official Form No. 3 prescribed by the Supreme Court of the United States requires a verification to a creditor's petition to be in the following form:

> "....., being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them *are true.*" (Italics ours.)

This Honorable Court has previously held in the case of *In re Gerber,* 186 Fed. 693, 26 Am. B. R. 608, that the orders and official forms in bankruptcy promulgated by the Supreme Court of the United States have the force and the effect of law.

This Honorable Court has likewise passed upon this exact question in the case of *Sabin v. Blake, McFall Co.,* 35 Am. B. R. 79, 223 Fed. 501. In that case the late Judge Morrow, after citing *In re Gerber, supra,*

pointed out that Form No. 3, as quoted above, differs from the verification prescribed in Form No. 1 for a voluntary petition, in that the latter form provides that the verification shall be made according to the best of the affiant's knowledge, information and belief. Judge Morrow then laid down the rule that a verification to a creditors' petition must be made on the actual knowledge of the affiant and not according to the best of his knowledge, information and belief. Great emphasis was placed on the fact that while in a voluntary petition the debtor admits his insolvency and consents to surrender his property for the benefit of his creditors, the situation is entirely different with respect to a creditors' petition, in that the hailing of a debtor into the Bankruptcy Court may be a very serious matter and bring about a bankruptcy that might have been avoided. To quote from his opinion:

> "Bankruptcy proceedings ought not to be subject to the alarm of creditors acting upon *information and belief,* based possibly upon mere gossip and rumor. They ought to know positively the truthfulness of the few facts they are required to present to the Court to secure an adjudication of bankruptcy. In the petition now before the Court, the creditors stated all the facts required and in the verification each stated 'the facts contained in the foregoing petition are true,' but added this qualification, 'as I verily believe.' Such qualification is no part of the form prescribed and there is nothing in the petition showing or tending to show that the qualification was necessary to suit the circumstances of the particular case as provided in Order No. XXXVIII. It may be that the added qualification was inserted by mistake following some erroneous form,

but in any view it rendered the verification defective." (Italics ours.)

It will be noted that the verification used by the appellees herein was slightly different from that discussed in *Sabin v. Blake McFall Co., supra.* In this case the verification was to the effect "that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true." Perhaps, if the petition contained no allegations on information and belief, the verification in the instant case would be good, as the qualification thereto could be disregarded as surplusage, but probably the most important allegation, that of the commission of the act of bankruptcy is based on information and belief, and the verification clearly qualifies that allegation. The result is, therefore, exactly the same as if the appellees had stated that the facts contained in the petition are true, as they verily believed.

In view of the decision of this Honorable Court in *Sabin v. Blake McFall, supra,* we believe it unnecessary to cite cases from other jurisdictions. However, in passing, we may note that a similar result has been reached in the Second Circuit in *In re Bieler & Batzer,* 295 Fed. 78, 2 Am. B. R. (N. S.) 192.

The contention of the appellant herein is even stronger than that urged in *Sabin v. Blake McFall, supra,* in view of the rule that the allegation of jurisdictional facts in a petition should not be made on information and belief. This rule is laid down in *Collier* 1927 Ed. p. 422, and finds support in the following cases:

In re Seifred, 4 Fed. (2nd) 305, 6 A. B. R. (N. S.) 33;

In re Rodriguez Torres & Co. (D. C. Porto Rico), 2 Am. B. R. (N. S.) 842;

In re Blumberg, 143 Fed. 845, 13 Am. B. R. 343.

In *In re Rodriguez Torres & Co., supra,* the first headnote is as follows:

> "An allegation in an involuntary petition of an act of bankruptcy by fraudulent transfer is insufficient which alleges, *merely upon information and belief,* that within four months preceding the filing of the petition the alleged bankrupt committed an act of bankruptcy by the conveyance, transfer, concealment or removal of a part of its goods and personal property in favor of parties unknown, with intent to hinder, delay or defraud their creditors." (Italics ours.)

In *In re Blumberg, supra,* the Court stated:

> "The difficulty of obtaining accurate information concerning fraudulent transfers of property or preferential payments has been suggested as an excuse for the vagueness of such averments as are found in this petition, and I am not insensible that such difficulty may often exist. Due allowance should be made for it, but the petitioning creditors are nevertheless bound to as full a disclosure as their information may enable them to make *supplemented by an explanation of its lack of completeness,* so far as it may thus be lacking. Impossibilities are not expected of petitioning creditors, more than of other suitors; but they must found their case on something more than rumor, or vague hearsay, or mere suspicion. If they cannot aver the necessary facts on personal knowledge, or credible information, which is full enough to supply details that will justify the inference that is sought to be drawn, they

simply furnish one more example of an intending litigant who may believe that his opponent has done wrong, but is unable to prove it." (Italics ours.)

CONCLUSION.

In conclusion, it is respectfully submitted that upon the facts, authorities and arguments set forth and referred to in the preceding pages, the order of the United States District Court for the Northern District of California adjudging the appellant a bankrupt should be vacated, and that these proceedings should be remanded to the Court below, with instructions to the said Court to permit the petitioning creditors to amend their petition within ten days by alleging the acts of bankruptcy in positive terms and verifying the said petition on the positive knowledge of the petitioners, and that if said amendments are not made within ten days, said petition should stand dismissed, and that the appellant herein be awarded his costs of appeal.

Dated, San Francisco,
October 21, 1929.

ERNEST J. TORREGANO,
CHARLES M. STARK,
Attorneys for Appellant.

AUGUST B. ROTHSCHILD,
Of Counsel.